1989

Forsgren-Perkins Engineering v. Mother Earth Industries and Delano Development : Brief of Appellant

Utah Court of Appeals

L. Charles Spafford; Chase Kimball; Spafford & Spafford; Attorneys for Plaintiff-Appellant.
Jack L. Schoenhals; Attorney for Defendants-Respondents.

IN THE UTAH [redacted]

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FORSGREN-PERKINS ENGINEERING,	:	BRIEF OF APPELLANT
Plaintiff-Appellant,	:	
v.	:	
MOTHER EARTH INDUSTRIES, and DELANO DEVELOPMENT,	:	
Defendants-Respondents.	:	Appeal No. 890378-CA

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APPEAL FROM THE JUDGMEN[redacted] THE FIFTH DISTRICT COUR'
FOR BEAVER COUNTY [redacted]. PHILIP EVES, Judge

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IN THE UTAH COURT OF APPEALS

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FORSGREN-PERKINS ENGINEERING,	:	BRIEF OF APPELLANT
Plaintiff-Appellant,	:	
v.	:	
MOTHER EARTH INDUSTRIES, and DELANO DEVELOPMENT,	:	
Defendants-Respondents.	:	Appeal No. 890378-CA

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BASIS OF JURISDICTION

The above-entitled appeal was originally filed in the Utah Supreme Court pursuant to Utah Code Ann. §78-2-2(3)(j) (1953 as amended) ("UCA"), who transferred this appeal to the Utah Court of Appeals pursuant to UCA §78-2-2(4). The Utah Court of Appeals obtained jurisdiction over this appeal pursuant to UCA §78-2a-3(2)(j).

The original appeal was from an Order of Dismissal from Fifth District Judge J. Philip Eves, and his refusal to entertain a Motion for Modification from plaintiff-appellant Forsgren-Perkins Engineering, ("Forsgren").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. May the Court enter an Order without allowing proper time for objection pursuant to Local Rule of Practice 2.9(b)?

2. If the Court enters an Order prematurely and then receives a timely objection thereto, must notice of the entry be given to the objector?

3. Does an unheard Objection to Order and/or Motion for Modification toll

4. Did the Court err in granting the Motion to Dismiss?

DETERMINATIVE STATUTES

UCA §78-13-1. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this Code: (1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. (2) For the partition of real property. (3) For the foreclosure of all liens and mortgages on real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

STATEMENT OF THE CASE

(Note. Neither counsel for plaintiff or defendant ever appeared before Judge Eves in this case, and the only available records are the pleadings and motions themselves. All pertinent materials will be supplied in the addenda attached hereto. The Fifth District Court did provide an Index To Record On Appeal, Exhibit A in the addenda.)

Forsgren and defendants-respondents Mother Earth Industries and Delano Development ("MEI") were involved together in a geothermal power project in Sulphurdale, Beaver County, State of Utah. Forsgren designed much of the project for MEI, which had

acquired the development rights from the federal government. A rift developed between the parties, and a mechanic's lien was filed by Forsgren on 4 September 1986. A suit to foreclose the lien was commenced on or about 23 March 1987 in the Fifth District Court of Beaver County, case C87-010. In addition, various related suits concerning the geothermal project had been filed in the Third District Court of Salt Lake County, consolidated case C86-6931. On or about 27 April 1987 MEI moved for a change of venue to the Third District action, or in the alternative to dismiss or stay the action. A copy of said Motion is attached hereto and incorporated herein as Exhibit B. The Motion for Dismissal in the Alternative was improper in this case because it stated that Forsgren had split its cause of action, but this is an error on the part of MEI. UCA §78-13-1(3) dictates that a mechanic's lien foreclosure can only be brought in the county where the action occurred, and Forsgren could not bring its foreclosure action in the Third District. Said statute provides only for a change of venue, to which Forsgren was prepared to acquiesce, hence its non-response to the Motion. On or about 18 May 1987 a hearing was scheduled on this Motion before the Hon. J. Philip Eves, which neither party attended due to a stipulated continuance. Judge Eves examined the Motion from MEI at that time, and entered a Minute Entry granting the alternative Motion to Dismiss on 18 May 1987, no notice of which was given to Forsgren, see Exhibit A. On 28 May 1987 MEI prepared an Order of Dismissal without Prejudice for the Court, a

copy of which was mailed to Forsgren. A copy of said Order is attached hereto and incorporated herein as Exhibit C. On 29 May 1987 Forsgren formally objected to the Order and requested a hearing pursuant to then current Local Rule 2.9(b), which objection was sent to the Court and MEI. Although Forsgren did not object to MEI's earlier Motion when it assumed that the Court would simply change venue pursuant to UCA §78-13-1, it objected most strenuously to the dismissal. A copy of said objection is attached hereto and incorporated herein as Exhibit D. In spite of this objection, the Court apparently signed the Order on 2 June 1987. Forsgren was never given any notice whatsoever that the Order had been signed over its objection, see Exhibit A. Some hearing dates for oral argument of the objection were made and cancelled, but never during this process was Forsgren ever apprised that the Order had in fact been entered.

Sometime during the next few months the parties orally agreed to the removal and consolidation of the lien foreclosure case to the related action in the Third District Court, and the attention of both parties turned from Beaver County to the very complex action unfolding in Salt Lake County. Forsgren, which had been under the impression MEI would draft the stipulation for its approval, finally drafted its own stipulation during November of 1988. This stipulation was sent to MEI, and was followed up with a phone call on 6 December 1988, at which time Forsgren was notified by MEI that the Order had been entered over their objection 18 months earlier. Although the dismissal was

nominally without prejudice, an action to foreclose a mechanic's lien must be commenced within 12 months pursuant to UCA §38-1-11, and the effect of the statute made this a dismissal with prejudice by the time the dismissal was discovered.

A Motion for Modification of Order was submitted to the District Court on 4 January 1989. A copy of said Motion is attached hereto and incorporated herein as Exhibit E. The Order denying said Motion was signed on or about 17 February 1989. A copy of said Denial of Motion is attached hereto and incorporated herein as Exhibit F. Notice of Appeal was filed 14 March 1989. A copy of said Notice of Appeal is attached hereto and incorporated herein as Exhibit G.

SUMMARY OF ARGUMENTS

1. THE COURT MAY NOT ENTER AN ORDER WITHOUT ALLOWING PROPER TIME FOR OBJECTION PURSUANT TO LOCAL RULE 2.9(b).

The Fifth District court entered the Order of Dismissal appealed from without allowing time for Forsgren to respond under local rule 2.9(b). Rule 2.9(b) requires that objections be made within five days, and Forsgren responded properly. Not only was the Order entered prematurely, but no notice was given Forsgren that the Order had been entered over its Objection. The local rules were designed to simplify and organize procedure before the court, and as such both attorneys and the court are bound by them, and each can also rely upon the other following them. Forsgren did not found out that the Order had been entered until over a year later, at which time it made a Motion for

Modification, asking that the case be reinstated and consolidated with a related action in the Third District. It was an abuse of discretion for the Fifth District Court to deny the Motion for Modification.

2. IF THE COURT ENTERS AN ORDER PREMATURELY AND OVER THE TIMELY OBJECTION OF THE OPPOSING PARTY NOTICE SHOULD BE GIVEN TO THAT PARTY.

Fundamental fairness requires that the Court rectify its irregularity or mistake by either vacating an order entered improperly, or notifying the parties that an improper entry has been made. The current Code of Judicial Administration states that not only does the opposing party have five days to object to a proposed judgment, but notice of the entry of judgment must also be given. This shows that the drafters of the new rules were aware of the possibility of this sort of error occurring and tried to safeguard against it. When apprised of the error, the Court should have vacated or modified the order.

3. AN UNHEARD OBJECTION TO ORDER AND A MOTION FOR MODIFICATION WILL TOLL THE TIME FOR APPEAL.

An improper entry of a judgment makes the judgment void or at the very least voidable, and the time for appeal should be tolled accordingly, since there is no truly final judgment to appeal from. A Motion for Modification is akin to a Utah Rules of Civil Procedure 59 Motion, which tolls the time for appeal, and since a Rule 59 Motion was not available to Forsgren, equity dictates that a Motion for Modification also tolls the time for

appeal.

4. THE ORDER DISMISSING THE ACTION WAS AN ERROR OF THE COURT. The Motion of MEI asking for dismissal in the alternative was in error when it stated that Forsgren had split its cause of action, because a lien foreclosure may only be brought in the county where the property lies. Therefore Forsgren could not have brought a foreclosure action in the Third District. Forsgren was willing to accept the Motion asking for change of venue, because that is within the discretion of the Court, but did not expect the Court to dismiss the case based on an obvious mistake on the part of MEI.

The Court erred in dismissing the case, and pursuant to the Motion and statute should have moved venue to the Third District.

ARGUMENT

I

THE COURT MAY NOT ENTER AN ORDER WITHOUT ALLOWING PROPER TIME FOR OBJECTION PURSUANT TO LOCAL RULE 2.9(b)

The Rules of Practice for the District and Circuit Courts of Utah were specifically designed so that following them would avoid confusion in the daily administration of the courts. Rule 2.1 specifically stated that the rules would cover all matters not specifically covered by the Utah Rules of Civil Procedure. The attorneys that practiced in Utah were required to follow them, or risk censure of various kinds. For instance, if a pleading did not conform to Rule 2.3 it could be stricken by the court. The courts relied on those rules to keep order, and attorneys were bound by them. By the same token, the attorneys

relied on those rules to keep order, and in much the same way the court was bound by them.

Rule 2.9(b) provided for a five day period for objections to be made to proposed Orders. Forsgren objected properly and had the right to rely upon the court noting its objection and not entering the Order.

There are a number of cases holding that attorneys have the right to rely upon the rules of the court. A case resembling the instant case in a number of important ways is Smith v. Fulyater, 47 Ill. App. 3d 662, 365 N.E.2d 92 (1977). This was an automobile injury and negligence case, filed in 1969 and then consolidated with some related cases. Four years later the consolidated case was placed on a military calendar because Fulyater was in the armed forces. Later the civil court removed the case from the military calendar and assigned it to a judge who scheduled a pretrial hearing in 1975. No notice of either of these events were given to plaintiff, contrary to the rules of the court. The plaintiff's case was dismissed when he failed to appear at said pretrial hearing. The Smith court held that it was "fundamentally unfair" to penalize the plaintiff when the court did not follow its own rules. Said court also held that equity demanded that notice of a dismissal be given to the party of record and ordered the case reinstated, holding that it was an abuse of discretion not to vacate the Order. Other similar cases holding that the plaintiff has the right to rely upon the court are: Laidler v. National Bank of Detroit, 133 Mich. App.

85, 348 N.W.2d 42 (1984); Heins v. Sutphin, 76 Mich. App. 562, 257 N.W.2d 169 (1977); Rhiner v. Arends, 2922 N.W.2d 399, (Iowa 1980); McKinley v. Town of Fredonia, 140 Ariz. 189, 680 P.2d 1250 (1984); Brown v. Weinstein, 40 Mont. 202, 105 P. 730 (1909).

II

IF THE COURT ENTERS AN ORDER PREMATURELY AND OVER THE TIMELY OBJECTION OF THE OPPOSING PARTY NOTICE SHOULD BE GIVEN TO THAT PARTY

Forsgren was given proper notification of the Order of Dismissal on or about 28 May 1987. Just as properly, it objected on or about 29 May 1987. This objection was pursuant to Rule 2.9(b), which states in pertinent part "Copies of the proposed...Orders shall be served on opposing counsel before being presented to the court for signature... Notice of objection thereto shall be submitted to the court and counsel within five days after service." Before the five day period had passed, the Court entered the Order, which was the Court's first procedural error or irregularity. Forsgren maintains that the Court had a duty to rectify its mistake by vacating the Order until a hearing could be had, or at the very least by notifying Forsgren that the Order had been entered over its proper objection, so that Forsgren might seek relief. The issue is whether failure to perform either of these acts was the court's second error, one fatal to the validity of the Order.

Under the holding of the Smith case cited supra this is an error, for the court stated "Fundamental fairness requires that notice of a default or a dismissal be given a party of record."

365 N.E.2d at 94.

One need look no farther than the current Code of Judicial Administration ("CJA") to find the Utah answer to this issue. The old Rule 2.9(b) has been superseded by Rule 4-504(2), which is substantially the same. However, a new section has been added to the Rule, specifically 4-504(4) which states in pertinent part "Upon entry of judgment, notice of such judgment shall be served upon the opposing party..." (it goes without saying that an Order of Dismissal is tantamount to a judgment). In other words, under the CJA the court must not only allow five days for the opposing party to object to the proposed Order, but it must also affirmatively notify the objecting party that the Order has been entered.

Apparently the drafters of the new CJA perceived a significant gap in the previous rules, and strove to patch it with the new paragraph 4. Under the CJA presumably the errors that led to the instant action would not have occurred, or at the very least there are now more safeguards against these types of errors. The arguments of the previous section, i.e., that attorneys have the right to rely upon court rules, and that it is an abuse of discretion to not vacate the dismissal when it is caused by an error on the part of the court, could appropriately appear here as well.

III

AN UNHEARD OBJECTION TO ORDER AND A MOTION FOR MODIFICATION WILL TOLL THE TIME FOR APPEAL

If an Order is entered over the timely and proper objection

of the opposing party, and the objection is not entertained by the Court, said Order can not truly be final. The Order of Dismissal was not proper, and therefore irregular and voidable. A leading case on this point is Pruitt v. Taylor, 247 N.C. 380, 100 S.E.2d 841 (1957), wherein it was held that "An irregular judgment is one rendered contrary to the course and practice of the courts. A motion in the cause is the proper course to pursue to obtain relief from a judgment so improperly entered.", Id. at 843.

A motion is exactly the course plaintiff pursued upon its discovery that the dismissal had been entered, and the case is before this court only because Judge Eves denied it. Forsgren maintains this was an abuse of discretion as discussed supra.

One cannot appeal an Order that one does not know has been entered over a proper objection. This is analogous to the tolling of the statute of limitations in the Utah Health Care Malpractice Act, UCA §§78-14-1 et seq. This Act mandates that the statute of limitations on tort actions will be tolled until the malpractice is discovered, see UCA §78-14-4, and appellant submits to this Court that a similar discovery standard should apply for filing a notice of appeal from an Order, particularly in light of the irregular entry of the Order in the instant case.

After the discovery of the entry of the Order, appellant filed a Motion for Modification of the Order. Several recent Utah cases examine the Motion for Modification and its ilk as it applies to the appeals process. State v. McMullen, 764 P.2d 42

(Utah App. 1988) recognizes the "Request to Reconsider" as being essentially the same as a Motion for a New Trial in the criminal context, or by extrapolation the same as a Utah Rule of Civil Procedure ("URCP") 59 motion.

Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42 (Utah App. 1988) deals with a Motion for Reconsideration. Said case observes that the Motion for Reconsideration is not expressly available under the Utah Rules of Civil Procedure, but notes that in the context of that particular case the motion was implied by the wording of URCP 54, and the court adopted a "substance over form" attitude.

The most recent, and for the purposes of this memorandum the most important of these cases, is Moon Lake Electric Assoc. v. Ultrasystems Western Const., 767 P.2d 125 (Utah App. 1988). In Moon Lake, the trial court granted summary judgment for defendant, and plaintiff filed a URCP 59 Motion for a New Trial. The trial court held that there was "no basis under Rule 59 for granting a new trial when in fact no trial was held." Id. at 26. On this reasoning defendant argued that there was no extension of time in which to file an appeal, and that the appellate court was without jurisdiction. The Court of Appeals noted that:

> Neither Utah R. Civ. P. 59 (new trial) nor Utah R. Civ. P. 56 (summary judgment) directly addresses the availability of a motion for a "new" trial following summary judgment. Our analysis of Rule 59(a) and the rationale behind it leads us to conclude that such a motion is, nonetheless, procedurally correct.

Id. at 127. The court also held:

> While there may be some logic in concluding that there

> can be no new trial where no trial has yet occurred, we should be less concerned with what this "reconsideration" procedure may be called so long as the procedure is available to litigants.

Id. at 127-8. The court then goes on to note that since this motion was considered proper pursuant to URCP 59, it also tolled the time for appeal, and the appeal was therefore proper and within their jurisdiction. The above language spells out succinctly the court's attitude that it will consider substance over form in these motions.

Utah law provides for a tolling of the time to appeal when a Motion for a New Trial is made. See Hume v. Small Claims Court, 590 P.2d 309 (Utah 1979). Rules of the Utah Court of Appeals ("RUCA") 4(b) also provides for the tolling of the time when URCP 59 motions are made. Equity would dictate the same tolling during a Motion for Modification.

The Motion for Modification also bears resemblance to URCP 60 motions for Relief from judgment or order. Paragraph (a) of said rule, dealing with clerical mistakes, gives no time limit for the Motion, and specifically states: "errors therein arising from oversight or omission may be corrected by the court at any time." Paragraph (b) prescribes other reasons for granting relief from a judgment or order, including mistake, surprise, excusable neglect, etc. Subsection (5) specifically gives void judgment as a reason, and significantly, there is no time limit given on when to make this motion pursuant to subsection (5), except that it be a reasonable time. The Heins case cited supra held that an 18 month delay between a dismissal for lack of

progress and a Motion to Reinstate was reasonable, in view of the fact that the delay was occasioned by mistakes from the Court. This case also held that the refusal to reinstate the case after motion was an abuse of discretion, thereby strongly implying that the judgment was void ab initio, or at the very least voidable.

Unfortunately, there was no procedure or motion exactly suited for the difficult and fairly unique situation Forsgren found itself in. A certain amount of improvisation was necessary, as neither URCP 59 nor 60 fit the facts precisely. Forsgren's Motion for Modification was designed to bring to the court's attention the fact that the Order had been entered improperly, and asked that the case be reinstated just long enough to be consolidated in conformance with the agreement of the parties.

IV

THE ORDER DISMISSING THE ACTION WAS AN ERROR OF THE COURT

Forsgren brought its lien foreclosure in the only forum available to it pursuant to UCA §78-13-1, which states that lien foreclosures must be tried in the county were the real property lies, although the Court may thereafter change venue. The property upon which the lien was placed was in Beaver County. MEI was therefore in error when its Motion in the Alternative to Dismiss stated that Forsgren had split its cause of action. See page 4 of Exhibit B. MEI is quite correct in stating that there were similar cases in Third District, but not a foreclosure action which the above-statute would have made impossible for

Forsgren to bring in the Third District.

Forsgren did not respond to the Motion for Change of Venue because there was a stipulated continuance, and because it was prepared to acquiesce to the change of venue. Forsgren was greatly surprised when the Court granted the Motion in the Alternative to Dismiss, because of the obvious error on the part of MEI in view of the venue statutes. When the court adopted the reasoning of MEI, it adopted the error as well, and the dismissal was in error.

It would be inequitable in the extreme to deny Forsgren its day in court because of errors and irregularities on the part of the Court. The inequity of dismissing a party without trial has been repeatedly noted by Utah courts, see e.g. Wells v. Walker Bank & Trust Co., Inc., 590 P.2d 1261 (Utah 1979); and King Bros., Inc. v. Utah Dry Kiln Company, 13 Utah 2d 339, 374 P.2d 254 (1962). The Wells case in particular speaks strongly on this point, stating:

> In addressing those arguments, we make the following observations. When a motion to dismiss is made, the trial court should adhere to a policy of being reluctant to turn a party out of court without a trial. A dismissal which does so is a severe measure and such a motion should be granted only when it clearly appears that the party would not be entitled to relief under any state of facts provable in support of its claim. In ruling on such a motion, the court should accept as true all material allegations and such reasonable inferences as to proof that properly could be adduced thereunder. Moreover, consistent with the policy of allowing parties access to the courts to settle controversies, where there is doubt about the foregoing, it should be resolved in favor of allowing the party the opportunity of presenting its proof. (citations omitted)

A review of the record will make it plain that Judge Eves was not attuned to this holding of the Utah Supreme Court when he dismissed Forsgren without even giving notice of his action.

CONCLUSION

Forsgren has been put in a most difficult position through irregularities on the part of the Fifth District Court, irregularities which it could have cured by reinstating the action and allowing what both parties had agreed to, consolidation with the related case in the Third District Court. Forsgren urges this honorable Court to allow it the opportunity to litigate its lien foreclosure case in some forum, rather than turn it out of court with no redress. Forsgren urges this Court to order the Fifth District Court to reinstate the action to allow it to be consolidated with the related Third District action.

DATED this 14th day of July, 1989.

SPAFFORD & SPAFFORD, P.C.

Chase Kimball
Attorney for Appellant
Forsgren-Perkins Engineering

MAILING CERTIFICATE

The undersigned hereby certifies that he mailed four copies of the foregoing Brief to Jack Schoenhals, 36 S. State #1200, SLC, UT 84111, on the above date.

Chase Kimball

ADDENDA AND EXHIBITS

IN THE FIFTH JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

* * *

FORSGREN-PERKINS ENGINEERING, p.a., An Idaho Corporation

Plaintiff

vs.

MOTHER EARTH INDUSTRIES, INC. a Delaware Corporation, and DELANO DEVELOPMENT, INC., a Utah Corporation

Defendants

INDEX TO RECORD ON APPEAL

CIVIL NO. 87-010

SUPREME COURT NO. 890099

* * *

EXHIBIT A

EXHIBIT A

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Telephone No. 538-2344

IN THE THIRD JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

FORSGREN-PERKINS ENGINEERING p.a., an Idaho Corporation, Plaintiff, vs. MOTHER EARTH INDUSTRIES, a Delaware corporation, and DELANO DEVELOPMENT, INC. a Utah Corporation, Defendants.	MOTION FOR CHANGE OF VENUE OR IN THE ALTERNATIVE TO DISMISS, OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS PENDING THE OUTCOME IN A CASE FILED PREVIOUSLY BY PLAINTIFFS. CIVIL NO. 87-010

The Defendant MOTHER EARTH INDUSTRIES, moves the above-entitled Court as follows:

1. For a change of Venue of the Above-entitled action to the Third Judicial District Court of Salt Lake County, State of Utah; or, in the alternative

2. For an Order dismissing the Complaint upon the grounds and for the reasons that Plaintiffs have asserted the claims set forth in this action by filing a Counterclaim in an action previously filed and pending in the Third

EXHIBIT B

EXHIBIT B

Judicial District of Salt Lake County, State of Utah; or, in the alternative

3. For an Order staying any and all proceedings in the above-entitled matter until the completion of litigation of the issues in the case currently pending in the Third Judicial District Court in and for Salt Lake County, State of Utah.

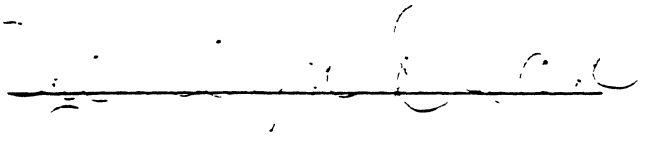
This Motion is based upon the files and records in this case and the Memorandum of Defendant MOTHER EARTH INDUSTRIES, in support of this Motion.

Dated this 17th day of April, 1987.

Jack L. Schoenhals
Attorney for MOTHER EARTH INDUSTRIES.

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Motion to Earl S. Spafford, L. Charles Spafford, Spafford & Spafford, 311 South State Street, Suite 330, Salt Lake City, Utah 84111 this 2nd day of April, 1987.



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IN THE THIRD JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

FORSGREN-PERKINS ENGINEERING p.a., an Idaho Corporation, Plaintiff, vs. MOTHER EARTH INDUSTRIES, a Delaware corporation, and DELANO DEVELOPMENT, INC. a Utah Corporation, Defendants.	:	MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE OF VENUE OR IN THE ALTERNATIVE TO DISMISS, OR IN THE ALTERNATIVE TO STAY ALL PROCEEDINGS PENDING THE OUTCOME IN A CASE FILED PREVIOUSLY BY PLAINTIFFS. CIVIL NO. 87-010

BACKGROUND FACTS

1. The Defendant in this action, MOTHER EARTH INDUSTRIES, filed a complaint against Plaintiff in the Third Judicial District Court of Salt Lake County, State of Utah. The issues raised in the Complaint are the same issues raised in the above-entitled action. The filing of that action pre-dated the filing of the above-entitled action. (See copy of Complaint attached.)

2. The Plaintiff filed a counterclaim against MOTHER EARTH INDUSTRIES. The issues raised by the Counterclaim are

identical to the issues raised in the above-entitled action. (See copy of counterclaim attached.)

3. The Plaintiff filed a Motion to Dismiss portions of the Counterclaim. (See copy of Motion and Memorandum attached.)

4. The Plaintiff filed a Motion for Sanctions. (See copy of Motion and Memorandum attached.)

5. The Plaintiff's principal place of business is located in Salt Lake County, State of Utah.

6. The Defendant's office in the State of Utah is located in Salt Lake County, State of Utah.

7. The vast majority of the Defendant's employees and witnesses are either located in Salt Lake County, or are out of the State of Utah.

8. Defendant believes that all of Plaintiff's witnesses are located in Salt Lake County, State of Utah.

9. The summons was served upon Defendant in Salt Lake County, State of Utah.

10. The attorneys for the Plaintiff and the Defendant are located in Salt Lake County, State of Utah.

11. It would be substantially inconvenient to present motions or to try the case in the venue chosen by Plaintiff, but it would be convenient for all parties and for all

witnesses to perform discovery and to try the action in Salt Lake County, State of Utah.

POINT NO. 1

THE VENUE OF THIS ACTION SHOULD BE TRANSFERRED TO SALT LAKE COUNTY FOR DISCOVERY AND FOR TRIAL.

Pursuant to the Utah Code Ann. and the Rules of Civil Procedure, the above-entitled action should be transferred to Salt Lake County, State of Utah.

The convenience of the parties and all counsel concerned would be substantially enchanced by transferring the venue to Salt Lake County. More than 30 to 40 witnesses may be called to testify at the time of the trial. Of the more than 30 to 40 witnesses, all but 2 or 3 anticipated witnesses either reside in Salt Lake County, or are out of state witnesses who would be flying to Salt Lake City on commercial airlines.

There is no compelling reason to perform discovery, handle motions or try the above-entitled matter in any venue other than Salt Lake County.

POINT NO. 2

DEFENDANT MOTHER EARTH INDUSTRIES IS ENTITLED TO AN ORDER DISMISSING THE COMPLAINT FOR THE REASON THAT THE CLAIMS ASSERTED BY PLAINTIFF HAVE ALREADY BEEN

ASSERTED IN AN ACTION PREVIOUSLY FILED IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

A review of the Complaint of Plaintiff and a comparison of that Complaint with the Counterclaim filed by Plaintiff in the Third Judicial District Court demonstrates that Plaintiff is asserting the right to recover the same amount of money for the same reasons in both actions.

The Complaint filed in the Third Judicial District Court pre-dates the filing of the above-entitled action.

There are numerous issues involving numerous parties and a significant amount of discovery and witnesses will be produced in the action filed in the Third Judicial District Court.

The amounts of money involved are substantial. If Mother Earth Industries prevails in its action filed in the Third Judicial District Court, either the Defendant's Counterclaim will be dismissed, or the claims asserted therein will be set-off as against the damages awarded to Mother Earth Industries. In no event does it appear likely that the Plaintiff in this action will be entitled to an

award of damages and to affirmative relief to foreclose its alleged lien.

It is Hornbook Law that you cannot either split your cause of action, or assert the same claim twice in two different actions.

Since the Plaintiff in this action asserted its claims in the Third Judicial District Court, it is not entitled to assert them a second time in this action and in this venue.

POINT NO. 3

DEFENDANT IS ENTITLED TO AN ORDER STAYING ANY AND ALL PROCEEDINGS IN THE ABOVE-ENTITLED MATTER UNTIL THE COMPLETION OF LITIGATION OF THE ISSUES IN THE CASE CURRENTLY PENDING IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

In the event the Court determines that it will not transfer the venue of the above-entitled matter and it will not dismiss Plaintiff's Complaint, the Defendant Mother Earth Industries is entitled to an order staying any and all proceedings in this action as long as the pending action in the Third Judicial District Court is being actively pursued and until the completion of that litigation and a determination being made concerning the relative rights and obligations of the parties thereto.

Before Plaintiff can establish its claim and right to

recovery, it will be necessary to resolve the claims made by Mother Earth Industries, and to resolve all the cross-claims and set-offs which are applicable and which are pending in the Third Judicial District Court.

The litigation pending in the Third Judicial District Court includes many claims, counterclaims, cross-claims and multiple parties which are not involved in this litigation. The issues and relative rights of the parties must be resolved before it can be determined whether or not the Plaintiff in this action has a right to recovery and an affirmative right to foreclose its lien. Pending such determination, Forsgren-Perkins is not entitled to a foreclose of its alleged lien. When the action pending in the Third Judicial District Court is resolved, that resolution will determine whether or not Forsgren-Perkins is entitled to an award of any damages and whether or not Forsgren-Perkins would be entitled to foreclose on its alleged lien.

This action should therefore be stayed pending such a determination being made by the Third Judicial District Court.

SUMMARY

Defendant Mother Earth is entitled to a change of venue of the above-entitled action to the Third Judicial District Court in and for Salt Lake County.

In the alternative, the Defendant Mother Earth is entitled to a dismissal of Plaintiff's Complaint for the reason that Plaintiff has previously asserted the same claims for the same sums of money for the same reasons in the Third Judicial District Court in and for Salt Lake County.

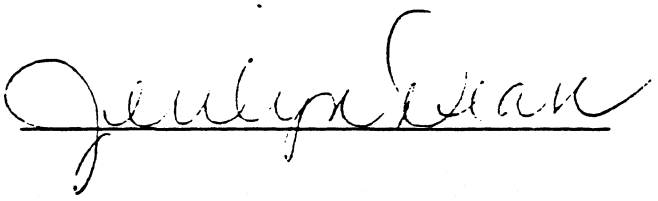
In the alternative, the Defendant Mother Earth is entitled to an order staying all proceedings in this action until a final resolution is made as to the claims of the parties in order to avoid duplicity of actions.

Dated this 17th day of April, 1987.

Jack L. Schoenhals
Attorney for Jay Hauth

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Motion to Earl S. Spafford, L. Charles Spafford, Spafford & Spafford, 311 South State Street, Suite 380, Salt Lake City, Utah 84111 this 27th day of April, 1987.



Jack L. Schoenhals #2881
Attorney at Law
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone No. 538-2344

IN THE FIFTH JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

FORSGREN-PERKINS ENGINEERING, p.a., an Idaho Corporation, Plaintiff, vs. MOTHER EARTH INDUSTRIES, a Delaware Corporation, and DELANO DEVELOPMENT, INC., a Utah Corporation, Defendants.	ORDER OF DISMISSAL Civil No. 87-010

The above-entitled matter came on regularly for hearing before the Honorable J. Philip Eves, pursuant to Defendant Mother Earth Industries Motion to Dismiss the Complaint of the Plaintiff, the matter being heard on the first regularly scheduled Law and Motion date following the filing of the Motion and Memorandum of Mother Earth Industries, Inc., no one appearing at the hearing, the Court having reviewed the files and records in this case, and the Motion and Memorandum of Mother Earth Industries, Inc., and good cause appearing therefore:

EXHIBIT C

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant Mother Earth Industries, Inc.'s Motion to Dismiss the Plaintiff's Complaint be, and the same is hereby granted without prejudice.

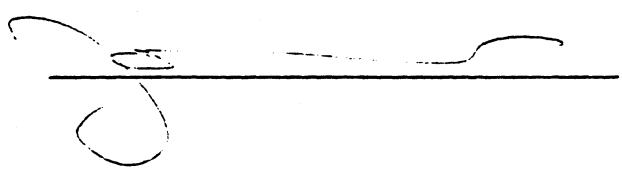
Dated this ____ day of May, 1987.

BY THE COURT:

J. PHILIP EVES, JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Order to Earl S. Spafford, L. Charles Spafford, 311 South State, Suite 380, Salt Lake City, Utah 84111, this 26th day of May, 1987.



KARL S. SPAFFORD (3051)
L. CHARLES SPAFFORD (4416)
SPAFFORD & SPAFFORD
A Professional Corporation
311 South State Street, #380
Salt Lake City, Utah 84111
(801) 531-8020

EXHIBIT A

Attorneys for Plaintiff, Forsgren-Perkins Engineering

IN THE FIFTH JUDICIAL DISTRICT COURT OF BEAVER COUNTY

STATE OF UTAH

* * * *

FORSGREN-PERKINS ENGINEERING, p.a., An Idaho Corporation, Plaintiff, vs. MOTHER EARTH INDUSTRIES, INC., a Delaware Corporation, and DELANO DEVELOPMENT, INC., a Utah Corporation, Defendants.	PLAINTIFF'S EXCEPTION TO ORDER OF DISMISSAL AND REQUEST FOR HEARING Civil No. 87-010

* * * *

COMES NOW the plaintiff by and through the undersigned counsel to respectfully take exception to the Proposed Order of Dismissal herein and to Move the Court for an opportunity to address the matter by oral argument, to allow the matter to be fully and fairly addressed on the merits and to provide the Court with a balanced presentation herein.

EXHIBIT D

DATED this _____ day of May, 1987.

SPAFFORD & SPAFFORD
A Professional Corporation

/s/

Earl S. Spafford
L. Charles Spafford

Attorney for Plaintiff,
Forsgren-Perkins Engineering

EXHIBIT B

CERTIFICATE OF MAILING

I, Michele Tangaro declare as follows:

My office address is 311 South State Street, Suite 380, Salt Lake City, Utah 84111. I am over the age of 18 years and not a party in this action.

On the date set forth below, I caused to be delivered by U.S. Mail, postage prepaid, true and correct copies of:

PLAINTIFF'S NOTICE OF HEARING AND

EXCEPTION TO PROPOSED ORDER OF DISMISSAL

To:

Jack L. Schoenhals
Attorney at Law
36 South State Street, #1200
Salt Lake City, Utah 84111

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this _____ day of May, 1987.

MICHELE TANGARO

EARL S. SPAFFORD (3051)
L. CHARLES SPAFFORD (4416)
JOHN A. DONAHUE (4975)
SPAFFORD & SPAFFORD
A Professional Corporation
425 East 100 South
Salt Lake City, Utah 84111
(801) 363-1234

Attorneys for Plaintiff

IN THE FIFTH JUDICIAL DISTRICT COURT FOR BEAVER COUNTY

STATE OF UTAH

----------ooo0ooo----------

FORSGREN-PERKINS, Plaintiff, vs. MOTHER EARTH INDUSTRIES Defendant.	**PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER** Civil No. C87-010 Judge J. Phillips Eves

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COMES NOW the plaintiff to move the above entitled court for a ruling on plaintiff's objection to order of dismissal and for an Order modifying the dismissal to allow transfer of these proceedings in consolidation with the pending Salt Lake County action herein. This Motion is based upon the following grounds:

1. On April 27,1987, defendant filed a Motion for a change of Venue or in the alternative to dismiss.

2. The matter was scheduled for hearing and continued on at least two occasions by both counsel.

3. On May 18, 1987, a Minute Order was entered

EXHIBIT E

dismissing the case without prejudice. Neither counsel were notified nor present.

4. On May 28, 1987, a proposed order dismissing the case was filed and mailed to plaintiff. A true and correct copy of said document is attached hereto and incorporated herein as Exhibit A.

5. On May 29, 1987, in conformance with Local Rule of Practice 2.9(b), plaintiff objected to the proposed order. A true and correct copy of said document is attached hereto and incorporated herein as Exhibit B.

6. The Objection and Memoranda apparently crossed in the mail and, on June 2, 1987 the court entered an Order dismissing the complaint without prejudice.

7. At no time, until December 6, 1988, has plaintiff's counsel received notice that the Order of Dismissal had been signed. Notice was first received when plaintiff's attorney directed his assistant to contact Mr. Schoenhals concerning a previous oral agreement that the Beaver County action could be refiled and consolidated with the Salt Lake County action. During this conversation, Mr. Schoenhals indicated that the Beaver County action had been dismissed.

8. We submit that because of the one year statute of limitations concerning the filing of Mechanic's lien foreclosure actions, and due to plaintiff's reasonable belief that the objection to the order of dismissal was pending, and that the

matter would simply be moved to Salt Lake by stipulation, plaintiff took no action. Plaintiff was by no means lax or careless in its attention to the matter, for plaintiff scheduled two hearings on its exception to the proposed order, and both were continued at the request of defendant.

9. We submit that in the light of the foregoing circumstances, it is appropriate for the court to modify its earlier Order dismissing the case, to instead provide for a change of Venue to the Salt Lake County jurisdiction.

10. This modification will not substantially harm any party, as the related case in the Third District is ongoing, and will be for some time.

DATED this 4th day of January, 1989.

SPAFFORD & SPAFFORD
A Professional Corporation

L. Charles Spafford
Attorney for the Plaintiff

EARL S. SPAFFORD (3051)
L. CHARLES SPAFFORD (4416)
JOHN A. DONAHUE (4975)
SPAFFORD & SPAFFORD
A Professional Corporation
425 East 100 South
Salt Lake City, Utah 84111
(801) 363-1234

Attorneys for Plaintiff

IN THE FIFTH JUDICIAL DISTRICT COURT FOR BEAVER COUNTY

STATE OF UTAH

----------ooo0ooo----------

FORSGREN-PERKINS, Plaintiff, vs. MOTHER EARTH INDUSTRIES Defendant.	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO MODIFY ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE Civil No. C87-010 Judge J. Phillips Eves

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PLAINTIFF, FORSGREN-PERKINS ENGINEERING, submits the following memorandum in support of its Objection to Dismissal and Motion to modify order dismissing complaint on file herein:

BACKGROUND

This Motion arises out of an Order of Dismissal which was apparently entered on June 2, 1987. Although Plaintiff filed a timely Objection to the Order, until December 6, 1988, was not advised that the Order had been entered. It was his understanding, based upon earlier oral agreements with defendants attorney, that this matter would be transferred under a stipulated change of venue and consolidated with the pending Salt Lake County action, styled, Forsgren-Perkin Engineering vs. Amfac

Plumbing/Mother Earth Industries vs. Forsgren Perkins Engineering (consolidating No. C86-6931).

Plaintiff further incorporated the facts set forth in his motion for modification of order in order to streamline the courts work in these proceedings.

DISCUSSION

It is just and proper for the Order of Dismissal to be modified and to allow for a change of venue to Salt Lake County. There will be no prejudice whatsoever to defendants if this motion is granted. There are parallel claims already pending in the Salt Lake action. The Salt Lake County action asserts causes of action claims for open account, unjust enrichment, and breach of contract. Many of the issues of the Salt Lake County case are identical with this case.

Moreover, there has been very little discovery which has taken place in the Salt Lake County action. As of this date only one deposition has been taken. As to discovery served upon defendants in that action, the answers filed have asserted primarily that the questions are best addressed by oral deposition. Simply stated, because discovery in the parallel action remains in an infant state, transfer of this matter to Salt Lake County to be consolidated with the parallel action will not impose any greater workload on defendants herein.

This modification would be in the interests of justice because plaintiff timely filed an objection to the order of

dismissal, and because the order was signed before the five day period for filing objections had run. This modification is not being sought because of neglect or carelessness of plaintiff, but because of natural confusion attendant to any large and complex civil action such as the Third District case discussed supra.

Finally, because the one year statute of limitations has run, if this court does not see fit to modify the order, plaintiff's position will be severely prejudiced thereby. WHEREFORE, plaintiff urges the court to modify its prior order to allow for transfer of this matter to be consolidated with the parallel Salt Lake County proceeding, in the interests of justice.

DATED this 24th day of January, 1989.

SPAFFORD & SPAFFORD
A Professional Corporation

L. Charles Spafford
Attorney for the Plaintiff

CERTIFICATE OF MAILING

I certify that on the 4th day of January, 1989, I caused to be hand delivered a true and correct copy of the foregoing Motion and Memorandum, postage prepaid and addressed to the following:

Jack L. Schoenhals
Attorney at Law
36 South State Street, #1200
Salt Lake City, Utah 84111

Jack L. Schoenhals (#2881)
Attorney for Mother Earth Industries, Inc.
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 538-2344

FIFTH JUDICIAL DISTRICT COURT IN AND FOR BEAVER COUNTY

STATE OF UTAH

FORSGREN-PERKINS ENGINEERING, INC.,	:	ORDER DENYING PLAINTIFF'S MOTION FOR MODIFICATION OF ORDER
Plaintiff,	:	
	:	Civil No. C87-010
vs.	:	Judge J. Phillips Eves
MOTHER EARTH INDUSTRIES, INC.	:	
Defendant.	:	

The above-entitled matter was presented to the Court for determination pursuant to Rule 2.8 of the Rules of Practice of the District and Circuit Courts, the Court having reviewed the Plaintiff's Motion for Modification of Order, together with the Memorandum in support thereof, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Modification of Order, and the Plaintiff's Reply Brief in Support of Plaintiff's Motion for Modification of Order, together with the files and records in this matter and now makes and enters the following Order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the

EXHIBIT F

Plaintiff's Motion for Modification of Order be, and the same is hereby denied.

Dated this _____ day of February, 1989.

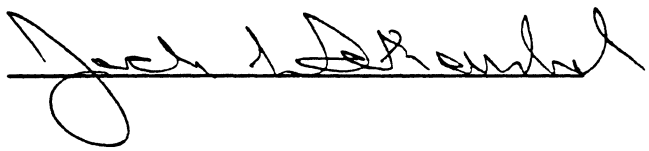
BY THE COURT:

_____
J. PHILIP EAVES, JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Order to the following, this 17th day of February, 1989.

Earl Spafford
L. Charles Spafford
First South 425 East
Salt Lake City, Utah 84111



file

L. CHARLES SPAFFORD (4416)
CHASE KIMBALL (4993)
SPAFFORD & SPAFFORD
A Professional Corporation
425 East 100 South
Salt Lake City, Utah 84111
(801) 363-1234

Attorneys for Plaintiff

IN THE FIFTH JUDICIAL DISTRICT COURT FOR BEAVER COUNTY

STATE OF UTAH

----------ooo0ooo----------

FORSGREN-PERKINS ENGINEERING, Plaintiff, vs. MOTHER EARTH INDUSTRIES, and DELANO DEVELOPMENT, Defendants.	NOTICE OF APPEAL Civil No. C87-010 Judge J. Philip Eves

----------ooo0ooo----------

COMES NOW THE PLAINTIFF and hereby gives all interested parties notice of its intent to appeal the ruling of the above-court dismissing the case as well as the denial of Plaintiff's Motion for Modification of Order. Said appeal is pursuant to URCP 73 and RUSC 3 and 4. This appeal is to the Utah Supreme Court in accordance with UCA §78-2-2(3)(i).

DATED this 14 day of March, 1989.

Spafford & Spafford, P.C.

Chase Kimball
Attorney for Defendant

EXHIBIT G

RULE 2.9. WRITTEN ORDERS, JUDGMENTS, AND DECREES

(a) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within shorter time as the court may direct, file with the court a proposed order, judgment or decree in conformity with the ruling.

(b) Copies of the proposed Findings, Judgments, and/or Orders shall be served on opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections thereto shall be submitted to the court and counsel within five (5) days after service.

(c) Stipulated settlements and dismissals shall be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

RULE 2.1. UTAH RULES OF CIVIL PROCEDURE

These rules shall govern the practice and procedure in the District Courts and Circuit Courts of the State of Utah in all matters not specifically covered by the Utah Rules of Civil Procedure

RULE 2.3. PLEADINGS

(a) In the District Courts the top page of each pleading shall contain the following: (Two inch top margin above court title)

Attorney's name:
Attorney for:
Address: (Use by Clerk)
Telephone:

IN THE _____ JUDICIAL DISTRICT
COURT OF _____ COUNTY, STATE OF UTAH

Name of Case Title of Pleading
No. of Case

In the Circuit Courts, the top page of each pleading shall contain the following:

(Two inch top margin above court title)
Attorney's name:
Attorney for:
Address: (Use by Clerk)
Telephone:

IN THE CIRCUIT COURT, STATE OF UTAH
_____ COUNTY, _____ DEPARTMENT

Name of Case Title of Pleading
No. of Case

(b) All pleadings shall be completely filled out, signed and properly notarized, when required.

(c) All pleadings shall be neatly typed, printed or photo copied in double spacing on one side of the page only and on white bond paper.

(d) Each paper shall be captioned on the first page with the title of the court and action, the file number and the nature of the paper. The upper margin on the title page shall be at least two (2) inches below the top of the page.

The names, addresses, and telephone numbers of counsel appearing for the party filing the pleadings shall be typed at the top left hand side of page one above the title of the court.

(e) The upper margin on all pages other than the top page shall be at least two (2) inches below the top margin.

(f) Names shall be typed or printed under all signatures to pleadings.

(g) All papers presented to the clerk of the court for filing shall be without back, flat and firmly bound together at the top.

(h) Papers which do not conform to this rule may be stricken by the court on its own motion.

Rule 4-504. Written orders, judgments and decrees.

Intent:

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen (15) days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless

the court otherwise orders. Notice of objections shall be submitted to the court and counsel within (5) days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen (15) days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain the address or the last known address of the judgment debtor and the social security number of the judgment debtor if known.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

38-1-11. Enforcement — Time for — Lis pendens — Action for debt not affected.

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same. 1953

RULE 59. NEW TRIALS; AMENDMENTS OF JUDGMENT

(a) Grounds.

Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for Motion.

A motion for a new trial shall be served not later than ten days after the entry of the judgment.

(c) Affidavits; Time for Filing.

When the application for a new trial is made under subdivisions (1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court.

Not later than ten days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment.

A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than three months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these Rules or by an independent action.